

**The Development of an Electoral Law Decision Database:
A Scoping Study**

A Report Commissioned by the Electoral Regulation Research Network

July 2017

Paul Kildea and Harry Hobbs
Gilbert + Tobin Centre of Public Law
University of New South Wales

Contents

Executive summary.....	3
Background to the scoping study	4
What is an ‘electoral law decision’?	4
Existing sources of ELDs and approaches to accessing them.....	5
Court and tribunal decisions.....	5
Electoral commission decisions	6
How stakeholders currently access ELDs	7
Purposes of an ELD database	8
(i) Organisation	8
(ii) Digitisation	8
Anticipated uses of an ELD database	8
Electoral commissions: Anticipated uses.....	8
Electoral commissions: Doubts about database utility	9
Academics	9
Scope of an ELD database	10
What sorts of decisions should be included in the ELD database?	10
Historical coverage: how far back?	11
Jurisdictions outside Australia?	11
Should material other than decisions be included?	11
Sourcing ELDs	13
(i) Decisions currently available in electronic format on AustLII	13
(ii) Decisions held by ECs, whether in electronic or paper format	13
(iii) Decisions held elsewhere	14
Database design	15
Database maintenance	15
Choosing the database’s technical home	15
AustLII.....	15
JADE.....	16
Subscription services.....	16
Choosing the database’s institutional home	17
Funding an ELD database	17
Developing an ELD database: Key questions	18
Appendix: People consulted in the preparation of this report.....	21

Executive summary

This report seeks to provide the ERRN board with the information it needs to decide whether an electoral law decision ('ELD') database should be developed and, if so, what form it should take.

The degree to which ELDs are accessible currently, and in what format, varies. Many court and tribunal decisions on electoral matters are available in electronic format through free online repositories (such as AustLII) and subscription services. However, numerous older, unreported and lower court decisions not available electronically or are otherwise difficult to locate. Electoral commission decisions are generally difficult to locate online.

Electoral commission officials and academics currently locate ELDs across a range of platforms. Almost all stakeholders use AustLII as either a primary or secondary resource. Some commissions use internal files or databases to access ELDs.

An ELD database could serve two potential purposes: organisation and digitisation. It could help to organise decisions that are currently available across multiple sources, and thus be a central repository for ELDs. And it could enable the digitisation of ELDs that are currently available only in hard copy.

Most electoral commissions considered that an ELD database would be useful as a research tool and that it would inform their work and decision-making. Some commissions questioned its utility, given the availability of ELDs on existing platforms. Academics were almost unanimous that an ELD database would be very useful in research and teaching.

Some electoral commissions felt that an ELD database should be limited to decisions of courts and tribunals, and perhaps only those of precedential value. Other commissions, and academics, thought that it should be comprehensive and include decisions of courts, tribunals and electoral commissions. Stakeholders had different views on how far back the database's historical coverage should go, and on whether it should include decisions from jurisdictions outside Australia. Academics were unanimous in their view that material other than decisions (eg, legislation, electoral commission reports and JSCEM reports) should be included, while there was more of a mix of opinions across the electoral commissions on this point.

Sourcing ELDs will constitute a significant part of the work of establishing an ELD database. The sourcing of decisions that are currently available in electronic format will be relatively straightforward. The workload and cost involved will be greater for decisions held by electoral commissions, and for decisions held in law reports, court registries and private collections, particularly where they exist only in hard copy and so need to be digitised.

In general, stakeholders would like an ELD database to be browseable by title, date, participants, jurisdiction and subject matter. They would also like to receive alerts when new material is added to the database. These features should be achievable.

The establishment and maintenance of an ELD database will require technical expertise, institutional support and a sound financial basis. AustLII is the strongest of the available technical services due to its experience and expertise in building, maintaining and housing online legal databases. The institutional home for an ELD database could be provided by the electoral commissions or by an academic institution. The database could be funded solely by the electoral commissions, or jointly by the commissions and universities with the assistance of academic research grants.

Background to the scoping study

In November 2016 the governance board of the Electoral Regulation Research Network ('ERRN') asked researchers associated with the Gilbert + Tobin Centre of Public Law to undertake a scoping study into the development of a database of Australian electoral law decisions ('ELDs'). The Board indicated that it had in mind an open-source database that is user-friendly and, as far as practicable, comprehensive. Dr Paul Kildea agreed to serve as Project Manager for the scoping study and to report to the Board by mid-2017. Mr Harry Hobbs joined the study as its Research Assistant.

In undertaking the scoping study, the authors of this report sought the views of all nine electoral commissions and of academics and other experts working in the field of electoral regulation. They also consulted with AustLII on technical and logistical issues regarding digitisation of sources and database organisation. A list of the people consulted appears in the Appendix.

This document reports on the views that stakeholders expressed during these consultations and on additional information collected through the authors' independent research. In doing so it seeks to provide the ERRN board with the information it needs to decide whether an ELD database should be developed and, if so, what form it should take. To this end, it addresses the following issues:

- What is an 'electoral law decision'?
- How are ELDs accessed currently?
- What would be the purposes of an ELD database?
- How might an ELD database be used?
- What would be the scope of an ELD database?
- How would ELDs be sourced for inclusion in the database?
- How should an ELD database be organised?
- Who would provide the technical expertise to establish and maintain an ELD database?
- Who would provide an institutional home for an ELD database?
- How would an ELD database be funded?

What is an 'electoral law decision'?

This report understands the term 'electoral law decision' to refer to decisions on electoral matters that have legal effect.

ELDs are made by a variety of bodies, including courts, tribunals and electoral commissions. They are made across all nine jurisdictions. ELDs are made on a wide variety of matters, including the franchise, candidate nominations, campaigning, political finance, party registration and disputed elections.

Existing sources of ELDs and approaches to accessing them

The degree to which ELDs are accessible currently, and in what format, varies.

Court and tribunal decisions

Many court and tribunal decisions on electoral matters are available in electronic format through free online repositories (such as AustLII and JADE) and subscription services (such as Westlaw and LexisNexis). Examples include decisions by the High Court, the Federal Court and the State Supreme Courts, and by the Administrative Appeals Tribunal and State civil and administrative tribunals.

However, many decisions are not available in electronic format or are otherwise difficult to locate. These include older decisions, unreported decisions, and the decisions of lower courts. Information about the availability of court and tribunal decisions online, and the periods for which they are available, is provided in Table 1.

Older decisions

Generally speaking, State superior court decisions that were handed down before the early 1990s are not available on AustLII. Such decisions, where they are reported, are available in hard copy in law reports. Examples of significant electoral law decisions that are not available on AustLII include *Baldwin v Everingham* [1993] 1 Qd R 10 (on the ability of courts to adjudicate on internal party disputes) and *McDonald v Keats* [1981] 2 NSWLR 268 (on the role of courts in reviewing electoral administration).

Unreported decisions

Unreported decisions on electoral matters can also be difficult to access. Although such decisions may not raise a significant point of law (hence their status as 'unreported'), they may nonetheless be of interest to administrators and scholars.

Lower court decisions

Decisions handed down by lower courts – such as local and magistrates courts, and district courts – are often difficult to locate. A small number of these decisions are available in electronic format on AustLII and on state government websites. However, decisions older than 10-15 years are not accessible in this way. More significantly, few decisions issued by lower courts are reported or made available to the public.

According to the NSW government's *Caselaw* website, for instance, the NSW Local Court 'publishes a small selection of decisions that provide interpretations of legislation and legal principles relevant to criminal, civil and other matters determined in the Local Court'. For District Court decisions, 'the decision to publish is at the discretion of each individual judge'. To cite one recent example from that state, Robert Smith (the registered officer for the Fishing Party) was convicted in 2015 by the NSW Local Court for failing to lodge a disclosure declaration and, several months later, the NSW District Court dismissed his appeal against this conviction. Neither decision is available publicly.

The authors contacted the Downing Centre Local Court registry in Sydney to learn more about why this is the case. The registry explained that decisions in that court are usually given verbally with the parties and representatives present. It noted that very

few decisions are given in written form. Parties may request a transcript of the proceedings if they require a written account of what was said in court. Non-parties can make a written request to the court for information or copies of documents; this must explain what is required, why it is required and who is requesting it. A Senior Manager will then consider the request. Based on this information, it is apparent that locating lower court decisions on electoral matters will sometimes prove challenging.

Table 1: Decisions available in electronic format: Courts and tribunals¹

	Cth	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
High Court	1903-								
Federal Court	1977-								
Full Court	2002-								
FCCA	2000-								
AAT	1976-								
HREOC	1985- 2001								
Supreme Court		1993-	1994-	1994-	1996-	1989-	1985-	1986-	1996-
Court of Appeal		1997-	1998-	1992-	1998-			2002-	1986-
Full Court						2010-	2010-	2014-	
Court Crim App		1998-					2010-		1986-
District Court ²		1992-	1993-	1998-	1999-	1992-			
Local Court ³		2002- ⁴	2006-	2006-	No	No	2002-	2012-	2002-
Civil & admin. tribunals		1999-	1998-	2009-	2005- ⁵	2015-		1993-	2015-

Electoral commission decisions

The degree to which electoral commissions make their decisions available online varies, both across the commissions and across different types of matters. Information about the availability of commission decisions on certain matters is provided in Table 2.

The decisions that are easiest to access are AEC decisions on party registration. The AEC website provides links to party registration decisions and changes, with coverage beginning in 2007. For example, in April 2016 the AEC published a notice that it had

¹ Refers to decisions published on AustLII unless otherwise indicated. Captures decisions of the previous iterations of decision making bodies where relevant – eg, the civil and administrative tribunal entry for NSW combines data for NCAT (2014-) and the Administrative Decisions Tribunal (1999-2013).

² Known as the County Court in Victoria. Note that many decisions of District Courts are unreported and/or not available publicly.

³ Known as the Magistrates Court in some jurisdictions. Note that many decisions of local courts are unreported and/or not available publicly.

⁴ Decisions published on <https://www.caselaw.nsw.gov.au>.

⁵ State Administrative Tribunal.

approved an application for the registration of Derryn Hinch's Justice Party. The AEC stands alone in this respect. State and territory commissions provide a list of registered parties only.

Putting aside AEC decisions on party registration, EC decisions are generally difficult to locate online. There is no central repository for such decisions.

Information about commission decisions can often be gleaned from reports and other documentation that the ECs publish online. Some commissions upload media releases about their more important decisions. For example, when the NSWEC decided in March 2016 that the Liberal Party of Australia (NSW Division) was ineligible for \$4.4m in public funding, it uploaded a statement from the NSWEC Chairperson, a detailed statement of facts and some relevant correspondence. Information about commission decisions can also be found in the various reports that ECs publish from time to time, including annual reports, and reports on specific topics such as public funding.

Table 2: Decisions available in electronic format: Electoral commissions

	AEC	NSWEC	VEC	ECQ	WAEC	SAEC	TEC	ACTEC	NTEC
Party registration	Decisions	List of reg. parties	List of reg. parties	List of reg. parties	List of reg. parties	List of reg. parties	List of reg. parties	List of reg. parties	List of reg. parties
Allocation of public funding	Report	Report	Report	Info only	Report	Report	N/a	Info only	N/a
Candidate nominations	Info only	Info only	Info only	Info only	Info only	Info only	Info only	Info only	Info only

How stakeholders currently access ELDs

Stakeholders explained that they currently locate ELDs and related material across a range of platforms. Almost all stakeholders identified AustLII as either a primary or secondary resource, and nominated Google as a useful tool for locating relevant material.

Some of the larger ECs, including NSW, Victoria, and Western Australia, said that they prefer to use internal files or databases to access ELDs. They generally use AustLII (or an alternative legal database) as a secondary resource. The WAEC explained that in the mid-1990s they designed an internal ELD database with a companion set of paper records. This database included decisions dating from 1869 and was run by legally trained commission staff and a law student intern. Due to staff turnover this database is no longer comprehensive, and has consequently lost some utility.

Other ECs reported wide use of AustLII. An ECQ official (authorised to contribute to the scoping study in his personal capacity only) noted that the ECQ does not subscribe to private databases (eg, LexisNexis, Westlaw AU), and so is reliant on AustLII as a free-access legal database. The ACTEC and NTEC explained that they often use the AEC website as a first port of call, drawing on its FAQs and Electoral Backgrounders to identify potentially relevant cases. Once identified, specific cases are then located via Google searches, and on AustLII.

Academics locate ELDs and other relevant material in diverse ways. Legal academics, in particular, identified AustLII as a primary resource. Political scientists reported drawing on a range of sources to learn about ELDs, including journal articles, news reports, conferences and word of mouth.

Purposes of an ELD database

Stakeholders identified two potential purposes of an ELD database: (i) organisation, and (ii) digitisation.

(i) Organisation

A database could serve as a central repository for ELDs, and so help to organise decisions that are currently available across multiple sources.

Most electoral commissions viewed this as the central purpose of an ELD database. The ACTEC envisaged the database as a 'one-stop-shop' where all ELDs can be located by electoral staff, lawyers, academics and legislators in an easily searchable format. Similarly, commissions in NSW, Victoria, WA, SA and NT considered that an ELD database would be a comprehensive repository of cross-jurisdictional ELDs, with the VEC noting that such decisions are currently 'scattered all over the place'.

(ii) Digitisation

Another purpose of the database could be to digitise ELDs that are currently available only in hard copy.

The TEC, NTEC and ECQ (personal capacity) each identified digitisation as a potential purpose. The TEC remarked that the database could help ensure that some older decisions, or cases in magistrate's courts which may still be of significance, could be stored digitally and thus be preserved for use into the future. This purpose was also recognised by some academics.

Anticipated uses of an ELD database

Electoral commissions: Anticipated uses

Most ECs considered that a digitised database of ELDs would be useful as a research tool. By providing easy access to ELDs from across Australia, it was felt that the database could improve awareness and understanding of decisions from other jurisdictions. Many commissions felt that this would, in turn, inform their own work and decision-making.

The VEC, for instance, explained that it is vitally important to understand what other ECs, as well as tribunals and courts, have decided when making decisions on similar matters. In particular, the VEC noted that cross-jurisdictional knowledge is very instructive when managing the register of political parties.

This position was also held by the Tasmanian, NT, ACT, NSW and WA commissions. In particular, the TEC explained that an ELD database would be useful in:

- Reviewing legislation and policy;
- Drafting legislation, particularly in relation to more contentious areas;
- Preparing documentation for Crown Law; and
- Preparing research papers for the commission or other research.

An additional anticipated use was identified by the NTEC. It considered that an ELD database may be especially useful for independent candidates seeking an understanding of electoral law requirements. The NTEC noted that independent candidates do not have the assistance of a larger party apparatus to explain electoral law requirements to them.

Both the NSWEC and WAEC cautioned that an ELD database would only be useful if users can trust it as comprehensive, reliable, accurate, and accessible. The NSWEC emphasised that the database would therefore need to be continually updated. The ACTEC suggested that commissions could email the manager of the database when they become aware that a new decision has been handed down.

The VEC and TEC were particularly enthusiastic about the idea of an ELD database. The VEC described it as a ‘great idea’, while the TEC noted that an ELD has been discussed for many years in electoral circles and would be ‘highly desirable’.

Electoral commissions: Doubts about database utility

A number of ECs saw limited utility in an ELD database. For instance, the AEC considered that a cross-jurisdictional repository of ELDs would ‘provide little benefit or assistance’. The AEC noted that:

- decisions made on State and Territory electoral legislation have little if any relevance to the interpretation of the *Commonwealth Electoral Act 1918* (Cth) (‘CEA’);
- the majority (if not all) of relevant cases on the CEA are already located on AustLII;
- staff at the AEC are able to access subscription case databases;
- the AEC publishes FAQs and Electoral Backgrounders that reflect relevant decisions; and
- a range of academic publications exist that cite and explain electoral law decisions.

On this basis, the AEC could not see what value an ELD database would have to its staff.

Similarly, while the SAEC considered that a central repository of ELDs would have value as a research tool, it did not believe that it would use such a database. Rather, it considered that it would be of greater use to academics. This is because most, if not all, legal issues that arise in the SAEC are sent to the South Australian Crown Solicitors, rather than worked out in-house.

Academics

Academics were almost unanimous that an ELD database would be very useful for them. Most considered that the central benefit lay in making sure that they are on top

of recent decisions at all levels, as well as more obscure decisions. This would assist in both research and teaching. However, some academics saw limited utility personally, because their particular focus is on High Court or Court of Disputed Returns decisions, which are already easy to access.

Scope of an ELD database

What sorts of decisions should be included in the ELD database?

Stakeholders were divided on this question. The NSW, WA, and NT electoral commissions considered that the database should have ‘as wide a remit as possible’. Other commissions thought that the database should be limited to decisions of courts and tribunals, and perhaps only those of precedential value.

Academics generally thought that the ELD database should be comprehensive and include decisions of courts, tribunals, electoral commissions and any other authorities (such as broadcasting authorities) that make decisions on electoral law. Michael Maley, for example, suggested ‘the more comprehensive the better’, while Zim Nwokora remarked that the scope should ‘err on the side of breadth... If [someone is] going to set up a database, [it] may as well be comprehensive’.

Court and tribunal decisions

All electoral commissions agreed that the database should include decisions by courts and tribunals. There was a difference of opinion, however, on how comprehensive this part of the database should be.

The VEC suggested that the database needs to strike the right balance between comprehensiveness and utility, and warned that the inclusion of too many ‘trivial’ decisions at lower levels may diminish the utility of the database. As such, it suggested that the database should only include substantial, helpful decisions. Likewise, the ACT and Tasmanian ECs, and a member of the ECQ (personal capacity) considered that the ELD database should be limited to decisions with precedential value. They thought that the utility of the database to ECs would be diminished if it were necessary to sift through decisions of no precedential significance.

Electoral commission decisions

The NSW, WA, Tasmanian and NT electoral commissions considered that the database should encompass decisions by ECs. The inclusion of decisions on party registration was singled out as being particularly useful. By contrast, the ACT and SA commissions, and a member of ECQ (personal capacity), thought that the database should be limited to decisions by courts and tribunals.

The WAEC cautioned that internal or administrative decisions are not standardised, and that some may be quite informal. As such, ECs may need to prepare a version that is suitable before it can be uploaded to the database. Along similar lines, the TEC explained that Tasmania does not currently have legislation on political finance for House of Assembly or disclosure for either House of Parliament or local government, and so there may be discrepancies in coverage across jurisdictions.

Historical coverage: how far back?

There was general agreement among stakeholders that the ELD database should include historical coverage rather than be limited to post-1984 decisions. This sentiment was expressed in different ways. The NSWEC considered that the database should include decisions ‘as far back as possible’, while the WAEC preferred ‘as far back as necessary’, and the NTEC ‘as far back as practical’. The ACT, Tasmanian and Victorian ECs agreed with the latter two formulations, noting that the database could prioritise more recent decisions because they are often more relevant, but include earlier decisions that are still cited. The TEC suggested deeper historical coverage could be limited to significant cases or issues, such as nomination eligibility, enrolment, electoral bribery/treating, and disputed elections.

Jurisdictions outside Australia?

Stakeholders had different views on the value of including decisions from jurisdictions outside Australia. The WA, Tasmanian and NT ECs did not see any value in including decisions from other jurisdictions. The VEC was open to the idea, but only if the inclusion of such decisions enhanced the utility of the database. New Zealand was the jurisdiction most commonly nominated by ECs as being relevant to their work. Decisions by authorities in the United Kingdom, Canada and the US were also mentioned as being of potential value.

Should material other than decisions be included?

Stakeholders were divided on the question of whether material other than decisions should be included in the database. Such material could include:

- Legislation;
- Electoral commission reports, submissions to inquiries and handbooks;
- JSCEM reports and transcripts of hearings;
- Academic reports commissioned by electoral commissions;
- ERRN reports;
- Cabinet documents that led to electoral law amendments, sourced through the Commonwealth archives;
- Legal opinions;
- Parliamentary debates on proposed electoral legislation;
- Journal articles;
- Maps of electoral boundaries;
- Media releases by relevant ministers; and
- Published opinion polls on attitudes to the electoral system.

Academics were unanimous in their view that material other than decisions should be included. At a minimum, this would include legislation, EC reports and submissions, JSCEM reports and commissioned academic reports. Several academics thought it should go further, and the list above reflects some of the suggestions made. It was thought that, if the database is to be a comprehensive repository, then it should include such material. One political science academic said that this would enhance the database, as he uses that kind of material more often than decisions. Another

remarked that the inclusion of such material would be excellent, as ‘these things are currently findable but dispersed across different sites’.

There was more of a mix of opinions across the electoral commissions, which can in part be explained by different views about the intended purposes and/or audience of the database. Overall, most ECs thought that the inclusion of a broader range of materials would be beneficial. For instance, the NSWEC noted that these documents ‘feed into decision-making’. Similarly, the WAEC noted that it would ‘very useful’ to include EC reports and submissions, and JSCem reports, especially when making their own submissions on electoral reforms. Likewise, the ACTEC believed that academic commentary would be useful. It explained that, as a small team with limited legal expertise, case notes, articles and reports that analyse and explain key decisions would greatly inform their decision-making.

An ECQ official (personal capacity) considered that such broader material would assist ECs in their strategic decision-making. In particular, the ability to assess approaches undertaken by other ECs was seen as beneficial with respect to forward planning, organisational change, and information sharing across jurisdictions.

By contrast, some ECs doubted the value of including material other than decisions. The NTEC suggested that, if the intended purpose of the database is to assist ECs in making decisions, it should focus on case law. The VEC remarked that much of this material (such as EC and JSCem reports) is already easily accessible on other websites. As such, even though the VEC thought that such material could valuably inform decision-making, it may not be necessary to include it in the database. The ACTEC and SAEC had sympathy with this view. The VEC was also concerned that an expansive database could be spread too thin. The TEC thought that the inclusion of wider material may be desirable, but was not sure about the practicalities of including it in the database.

The SAEC was of the view that the primary audience of any ELD database will be academics and, as such, thought that the inclusion of a broader range of materials would be useful. They considered that a central repository of this hard-to-find material would be very helpful for comparative electoral law research.

Some stakeholders noted that legal opinions would be a fruitful source of information. However, as they acknowledged, legal opinions would be subject to legal professional privilege and would be difficult to include on the database. Michael Maley noted that some early legal opinions, including Sir Robert Garran’s opinion on Aboriginality and section 41 of the *Constitution*, have been published in the three volumes of *Opinions of Attorneys-General of the Commonwealth of Australia, with Opinions of Solicitors-General and the Attorney-General’s Department* (AGPS), which covers the period 1901-1945. Maley suggested that some older legal opinions might be able to be declassified. Alternatively, the WAEC suggested that the database could include a statement to the effect that ‘this is a matter on which an electoral commission has sought legal advice’. This would raise awareness among ECs about legal opinions on electoral matters, and foster communication about them.

Sourcing ELDs

Sourcing ELDs will constitute a significant part of the work of establishing an ELD database. The sourcing of some decisions (and, if applicable, other materials) will be relatively straightforward, while sourcing others will be logistically challenging. In thinking about this task, we can usefully divide ELDs into three categories:

- (i) Decisions currently available in electronic format on AustLII;
- (ii) Decisions held by ECs, whether in electronic or paper format;
- (iii) Decisions held elsewhere.

(i) Decisions currently available in electronic format on AustLII

These decisions will be easy to locate. Further, if AustLII were chosen as the technical home of the ELD database, such decisions would be included automatically through the execution of a tailored search query and via automatic periodic scans (see further under ‘Choosing the database’s technical home’).

(ii) Decisions held by ECs, whether in electronic or paper format

Locating decisions that fall into this category will involve more work. The workload involved will depend on the ease with which the ECs can identify and locate such decisions internally, and make them available in a format that facilitates inclusion in the database.

In relation to this category of decisions, each EC was asked:

- How many decisions do you have on hand?
- How easy are they to access?
- How long would it take to access them?
- Are they already publicly available in some form?
- Would there be any difficulties in transferring/delivering them to the database’s technical home?

Unfortunately, ECs were unable to answer these questions in a detailed manner. The commissions noted that providing accurate answers to these questions would take a substantial period of time, and that they would be happy to look into these matters further if the database goes ahead. Indeed, as the VEC explained, the answers to these questions ultimately depend on the scope of the database – for example, whether the database will include decisions of lower courts and more historic cases.

The SAEC did respond in detail to these questions. The SAEC noted that there are 54 items on AustLII that relate to SA electoral law, and approximately 414 items in paper or electronic format held by the Commission but not by AustLII. However, these items all relate to legal advice on interpretations of electoral law (both state and local government). These items would all be subject to legal professional privilege and therefore could not be made available. Further, many likely relate to decisions regarding complaints during elections, including illegal practices and other breaches of the electoral act, making them particularly sensitive and not suitable for publication.

The NTEC estimated that there might be five decisions that fall into this category. It noted that they may be difficult to locate but that it would make the effort to find them if the database went ahead.

It is likely that the ECs hold numerous lower court decisions by virtue of having been a party in the proceedings. The TEC acknowledged this, noting that it holds some Magistrate Court decisions in paper format. It could not say whether those decisions are publicly available elsewhere.

Significantly, the VEC informed the scoping study that it holds a large number of historical electoral law decisions in hard copy. It possesses a bound, five-volume book of electoral cases that covers the period from the 1840s to the 1980s.

AustLII explained the logistics of adding electronic and paper copies of decisions (and other material) to its online collection. It can upload content made available to it in HTML and Word formats, but prefers the latter. Where only paper copies are available, AustLII prefers for these to be made available to it, so that it can scan them into electronic format and enter appropriate metadata.

(iii) Decisions held elsewhere

ELDs could also be located from other sources, including law reports, court registries and private collections.

Law reports

As noted, the AustLII collection includes State superior court decisions that date from about 1990 onwards. Earlier reported decisions are available in hard copy in various law report series. Such decisions could be scanned for inclusion in an ELD database.

Court registries

As explained above, most lower court decisions are unreported and many are not issued in written form. However, court registries may make decisions and transcripts available to non-parties on request.

Where an electoral commission has been a party to proceedings in a lower court, it is entitled to a copy of relevant court documents. However, there will be a small number of election-related lower court decisions in which an electoral commission is not a listed party. The NSWEC and VEC observed that the civil and administrative tribunals occasionally hear matters in which the commissions are not a party, but that nonetheless touch on electoral law. The WAEC suggested that cases brought by individual local governments to the Magistrates Court sitting as the Court of Disputed Returns may also fall into this category of decisions.

Private collections

Private collections can also be a fruitful source of ELDs. Professor Graeme Orr informed the scoping study that he has a significant trove of cases dating to colonial times, as well as 3-4 binders of local government cases. Professor Orr said that he would be willing to open his collection to an ELD database after the publication of the second edition of *The Law of Politics*, due mid-2018.

Database design

In general, stakeholders would like an ELD database to be browseable by title, date, participants, jurisdiction and subject matter. Of these, the ability to browse by subject matter was seen as especially desirable. Some stakeholders identified specific topic areas that they would like featured in a database, including 'franchise', 'compulsory voting', 'public funding' and 'what is a donation'.

AustLII reported that it can easily design a database to enable browsing by title, date and jurisdiction. However, it is more difficult to set up subject matter browsing because one relies on the quality of headnotes, catchwords and other relevant data that the decision-maker has recorded for its decisions. AustLII noted that the quality of such data varies across courts, jurisdictions and time and that 'by and large you won't have good catchword data built into the cases'. Nonetheless, were electoral commissions to make their decisions available to AustLII, it would be open to the commissions to attach sophisticated catchword data to those decisions. This would facilitate subject matter browsing.

AustLII suggested a possible work-around with respect to subject matter browsing. For the nominated subject matter area (eg, 'compulsory voting'), AustLII could develop a search query that incorporates a range of different catchwords related to that area. The results generated by that search query should then be relevant to the subject matter. That search query could be updated automatically on a daily basis, so that at any one time a user could access ELDs on that particular subject matter.

Several stakeholders said that they would like to receive alerts when new material is added to the ELD database. AustLII reported that this could be achieved by setting up an RSS feed to which users could subscribe.

Database maintenance

Once established, an ELD database would need to be maintained to ensure that it remained comprehensive and up-to-date. The electoral commissions generally reported that they would be happy to contribute to the maintenance of the database by forwarding on new decisions and otherwise communicating about developments that may be relevant to the database.

The successful maintenance of an ELD database would also require technical expertise, an appropriate institutional home and a sound financial basis. Each of these issues is discussed below.

Choosing the database's technical home

The scoping study identified three services with the technical expertise necessary to house an ELD database. This section assesses the strengths and weaknesses of each. Of the three, AustLII is the strongest candidate due to its experience and technical expertise in building, maintaining and housing online legal databases.

AustLII

AustLII is an online free-access resource of Australian legal information. It publishes primary legal materials (legislation, decisions of courts and tribunals) and secondary

legal materials (law reform reports, royal commission reports, law journal articles). According to its website, AustLII is Australia's most popular legal database, with over 4 million sources and 700,000 visits daily.

AustLII has experience in establishing and hosting subject-specific libraries similar to the proposed ELD database. It currently houses 20 subject-specific libraries in areas ranging from Australasian Colonial Legal History to Cyberspace Law and Resources. To take one example, the Australasian Aviation Law Library is a comprehensive and searchable collection that provides, in one location, a wide variety of aviation law-related resources including legislation, case law, legal scholarship, law reform publications and treaties. The documents in the subject-specific libraries are added in different ways: for instance, some are identified and added manually, while others are added via a sophisticated search query that extracts relevant resources (including case law) from AustLII's general collection. Once a subject-specific library is created, relevant material subsequently placed in AustLII's general collection will continue to be picked up via automatic periodic scans.

AustLII's status as a free-access legal database is another strength. As an ECQ official (personal capacity) explained, not all ECs have access to subscription legal services, and would therefore not be able to access an ELD database if it were located on a paid service.

However, stakeholders did express some concern about AustLII. In particular, concerns were raised over AustLII's design and interface. Some stakeholders considered AustLII's pared back interface made it less pleasant to read decisions as compared to other databases, while a few said that they had found it difficult to browse decisions.

JADE

JADE (Judgement and Decisions Enhanced) describes itself as a 'current awareness service for legal professionals'. It 'does not comprehensively cover all historical decisions for all jurisdictions' but contains decisions made available online to the public by courts and tribunals. Jade is working to backfill historical coverage, but notes that comprehensive online availability should not be expected before 1999. JADE currently has over 430,000 decisions and almost 90,000 statutes from 101 jurisdictions.

JADE is designed to be accessed via a search function rather than by browsing. Nonetheless, its repository is searchable by 'topic'. No 'electoral law' subject area currently exists.

Some stakeholders preferred JADE's design and interface, finding its content easier to read than AustLII. However, they noted that AustLII has an easier search function.

Subscription services

LexisNexis and Westlaw AU are the two main legal database subscription services. They both offer a considerable collection of court and tribunal decisions, as well as case commentaries and journal articles. Despite the benefits that such a comprehensive collection of legal resources would bring to an ELD database, stakeholders were unanimous in their preference for a free service.

Choosing the database's institutional home

There would be value in providing an ELD database with an institutional home. This would ensure that, once the database is established, a single body is responsible for overseeing its maintenance, even if the job of keeping the database comprehensive and up-to-date is a collective endeavour. An important consideration is that the host of the database has personnel with the expertise and capacity to undertake this oversight role. Given this, the two primary candidates for database hosting are electoral commissions and academic institutions.

Electoral commissions possess significant expertise, and their role in administering the electoral system means that they have a deep knowledge of many ELDs. It is probably unworkable for all nine commissions to perform the role collectively (unless the ECANZ secretariat wished to take it on). For practical purposes, it would make sense for a single commission to assume the hosting role. Many commissions, particularly the smaller ones, may question whether they have capacity to take on such a role. Individual commissions may also possess significant expertise with respect to ELDs in their jurisdiction, but lack the global view that would be valuable in overseeing the database.

Academic institutions have subject matter expertise. Researchers are less likely to have the fine-grained knowledge of electoral administration that commission officials have, but may be in a position to take a more global view of the field. Academic institutions have the virtue of being independent of the electoral system; unlike commissions, they are not in a position to make ELDs of the sort that would appear in the database. In terms of capacity, academic institutions may be more able than commissions to employ research assistants and interns, including on an *ad hoc* basis, to assist with the maintenance of the database. The types of academic institutions that would be suitable as database hosts include law schools, political science schools, and research centres that have a focus on electoral matters (such as the Gilbert + Tobin Centre of Public Law at the University of New South Wales).

The hosting role would present both opportunities and challenges. It would provide the host institution with the chance to involve its personnel (whether they be engaged as full-time staff, research assistants or interns) in interesting, election-related work that has the potential to benefit practitioners and researchers in the field. It would also help to establish (or strengthen) that institution's reputation for engagement with, and contribution to, the field of electoral law. On the other hand, there would be resource implications for the host institution. These implications may be modest or substantial depending on the agreed scope of the database. For example, a database that includes decisions that are difficult to locate (such as local court judgments) would require more active supervision, maintenance and liaison with the technical service provider than a database that restricts itself to decisions already available in digital form. These are matters that would need to be discussed with any prospective host institutions.

Funding an ELD database

The cost of establishing and maintaining an ELD database will depend largely on its scope. For instance, a database that is confined to decisions that are already available

in electronic format will be less expensive than a database that also includes material that exists only in hard copy. This is because paper-based materials must be scanned, and appropriate metadata recorded. It is therefore not possible to estimate the cost of an ELD database until a decision is made on its contents.

Cost aside, an important consideration is how to fund the creation and maintenance of an ELD database. One possibility is for the database to be funded solely by the electoral commissions. Each commission could contribute funds according to their relative size and capacity. As noted, the various commissions hold different views as to the utility of an ELD database, and this may influence their interest in supporting the project financially.

Another possibility is for the funding of the database to be shared between the electoral commissions and universities. Under this approach, the electoral commissions could commit to funding the database up to a certain amount, with the remainder of the funds being raised through academic research grants. While the competition for such grants is high, the commissions' demonstrated commitment to the project would enhance the chances of success.

By way of example, two sources of academic funding that might be suitable are the Australian Research Council's Linkage Infrastructure, Equipment and Facilities (LIEF) scheme, and internal university schemes. The LIEF scheme provides funding for research infrastructure, equipment and facilities that can be shared between higher education organisations and also with industry. The proposed ELD database is an example of research infrastructure and so falls within the scope of this scheme. However, it is a relatively modest project in terms of cost and likely audience, and so may not be a good fit for the LIEF scheme, which tends to support large-scale research infrastructure (the minimum level of funding provided by the ARC is \$150,000 a year). (Note that the ARC Discovery and Linkage schemes would not be appropriate for the funding of an ELD database. Those schemes are designed to fund research, not the building of research infrastructure.)

Some universities administer internal funding schemes that could potentially support the development of an ELD database. The Research Infrastructure Scheme (RIS) at UNSW, for example, aims to support the acquisition of research infrastructure and equipment. Unlike the LIEF scheme, the RIS supports more modest projects: there is no lower limit on the level of funding requested, and funding is generally provided for one year only. Applicants must be UNSW staff. This scheme and others like it would be worthy of further exploration in the event that a decision is made to establish an ELD database.

Developing an ELD database: Key questions

The aim of this report has been to provide the ERRN board with the information it needs to decide whether an ELD database should be developed and, if so, what form it should take. As is apparent from the discussion in this report, those decisions will involve making judgments on a range of issues. This concluding section sets out the key issues that require discussion and resolution before any commitment to building an ELD database can be made.

Developing an ELD database

1. Should an ELD database be developed? Would it be of sufficient value to electoral commissions, electoral scholars and the public to justify its cost?

Purpose and utility

2. Would the purpose of an ELD database be to (a) organise ELDs into a single repository, (b) digitise ELDs currently available in hard copy only, or (c) both?
3. Is it anticipated that the database would (a) inform the work and decision-making of electoral commissions, (b) support research on electoral regulation, or (c) both?

Scope

4. Should the database include court and tribunal decisions only, or should it extend to decisions by electoral commissions and other authorities?
5. For court and tribunal decisions, should the database restrict itself to decisions already made available in electronic format, or should it also extend to:
 - Superior court decisions currently only available in hard copy; and
 - Lower court decisions, many of which are unreported and available only by request to relevant registries?
6. For electoral commission decisions, should the database restrict itself to decisions on party registration, or should commission decisions on other matters also be included?
7. Should the database focus on recent decisions, or should its coverage go ‘as far back as possible’? If the latter, should priority be given to decisions on particular issues, or that have precedential value?
8. Should the database include decisions from jurisdictions outside Australia? If so, which ones?
9. Should the database include material other than decisions, such as legislation, electoral commission reports, JSCEM reports and commissioned academic publications?
10. Should the database be comprehensive at the outset, or should there instead be a staged rollout (whereby the database initially includes only decisions that are easily sourced, and progressively adds other decisions as they become available)?

Design

11. What design features should an ELD database have? Eg, searchable; browseable by title, date, jurisdiction and subject matter; capable of providing alerts for new content.

Technical home

12. Should the technical service provider for the ELD database be AustLII, JADE or a paid subscription service?

Institutional home

13. Should the institutional home of the ELD database be provided by the electoral commissions or by an academic institution?

Funding

14. Would the electoral commissions be responsible for funding the creation and maintenance of an ELD database? Or would funding responsibility be shared between the electoral commissions and universities with the support of academic research grants?

Appendix: People consulted in the preparation of this report

Electoral commissions

Mr Paul Pirani	Australian Electoral Commission
Mr Mel Keenan	NSW Electoral Commission
Ms Sarah Wyatt	NSW Electoral Commission
Mr Paul Thornton-Smith	Victorian Electoral Commission
Mr Adam Wilson (personal capacity)	Electoral Commission Queensland
Mr Justin Harbord	Western Australian Electoral Commission
Mr David Gully	South Australian Electoral Commission
Ms Nicole Lugg	Tasmanian Electoral Commission
Mr Iain Loganathan	Northern Territory Electoral Commission
Mr Rohan Spence	Elections ACT

Academics and other experts

Professor Nicholas Aroney	University of Queensland
Associate Professor Sean Brennan	Gilbert + Tobin Centre of Public Law
Associate Professor Philip Chung	AustLII
Professor Graham Greenleaf	AustLII
Professor Lisa Hill	University of Adelaide
Dr Ron Levy	Australian National University
Mr Michael Maley	Electoral Regulation Research Network
Dr Stephen Mills	University of Sydney
Dr Narelle Miragliotta	Monash University
Dr Zim Nwokora	Deakin University
Professor Graeme Orr	University of Queensland
Professor Marian Sawer	Australian National University
Professor Rodney Smith	University of Sydney
Associate Professor Joo-Cheong Tham	University of Melbourne
Professor George Williams	University of New South Wales